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In The

# SUPREME COURT of the UNITED STATES

October Term, 1968

No. 500

ARNOLD GROVER SCHMEAR,

*Petitioner,*

*v.*

JOHN R. GAGNON, Warden
Wisconsin Correctional Institution,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

### JURISDICTION

Respondent opposes the granting of a writ of certiorari on the ground that the facts of this case do not present any substantial federal question in connection with the admission in evidence of articles seized from petitioner incidental to his arrest.

## STATEMENT OF FACTS

There is no dispute about the facts. They were stipulated in the state court (R. 48) and the stipulated findings appear at R. 49-52.

Petitioner was arrested on a warrant charging forcible rape issued by the district attorney of Jefferson county, Wisconsin, on November 9, 1963 pursuant to secs. 954.01 and 954.02 (3) and (5), Wis. Stats. 1963. Pursuant to the arrest certain clothing of petitioner was seized and sent to the Wisconsin state crime laboratory for examination. After one mistrial, petitioner was again tried commencing August 12, 1964. No objection to the introduction of the clothing in evidence and the testimony of the state crime laboratory technician was made on the ground of illegal search and seizure because the defense attorney did not believe that he could prevail on that ground. He did, however, object on other grounds which were overruled, and renewed his objection, after conviction, in his motion for new trial. He was of the opinion that the question of the admissibility of the evidence was crucial (R. 66). Respondent makes no claim that the admission of the evidence was harmless error.

On June 25, 1965, petitioner's conviction was affirmed by the Wisconsin Supreme Court. *State v. Schmear*, 28 Wis. 2d 126, 135 N. W. 2d 842.

On November 2, 1965, the Wisconsin Supreme Court held that district attorneys were not competent to issue warrants of arrest, on federal constitutional grounds. *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 597-598, 137 N. W. 2d 391.

Thereafter, petitioner brought habeas corpus proceedings in the Wisconsin Supreme Court on the ground that his arrest based on a district attorney's warrant was invalid and therefore the seizure of his clothing and evidence based thereon was illegal and the evidence should have been excluded at the trial. The Wisconsin Supreme Court declined to apply the rule of *State ex rel. White v. Simpson, supra,* retroactively and denied issuance of the writ. *State ex rel. Schmear v. Gagnon,* (1967) 35 Wis. 2d 447, 151 N. W. 2d 20.

In this federal habeas corpus proceeding the district court has held that the petitioner's arrest was illegal because the warrant was not issued by a magistrate and therefore the evidence seized pursuant to the arrest was inadmissible and was prejudicial, in violation of due process of law under the Fourteenth Amendment. The opinion does not deal with the question of retroactive application of *State ex rel. White v. Simpson,* (1965) 28 Wis. 2d 590, 137 N. W. 2d 391. The Court of Appeals reversed on the ground that the rule of *State ex rel. White v. Simpson* should not be applied retroactively, agreeing with the position of the Wisconsin Supreme Court in that respect.

## ARGUMENT

### I. NOTHING IN THE FOURTH AMENDMENT DISQUALIFIES PROSECUTING ATTORNEYS FROM MAKING FINDINGS OF PROBABLE CAUSE AND ISSUING WARRANTS OF ARREST.

The Fourth Amendment provides:

> "ARTICLE IV.
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Amendment is silent about who is to issue warrants. The word "magistrate" does not appear in the Amendment. The United States Supreme Court decisions relied upon below by petitioner all involved the question whether the determination of probable cause was to be made by a *policeman or other enforcement officer,* or "a neutral and detached magistrate." Stress is placed upon the fact that the former are "engaged in the often competitive enterprise of ferreting out crime."

> See, e.g., *Johnson v. United States,* (1948) 333 U. S. 10, 14, 68 S. Ct. 367, 369, 92 L. ed. 369, 436;
>
> *Giordenello v. United States,* (1958) 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 2 L. ed. 2d 1503, 1509;
>
> *Jaben v. United States,* (1965) 381 U. S. 214, 85 S. Ct. 1365, 14 L. ed. 2d 345.

The district attorney, however, is in a different situation entirely. As is well known, in practice, he is the one who calls the shots, determining whether a suspect shall be charged and if so with what offense, applying to his determination of that question a higher standard of proof than that required to establish probable cause for an arrest. He is the one who will have to prosecute the case, and he tends to view the proof from the point of view of whether it will establish guilt beyond a reasonable doubt.

In the federal system, his all-powerful position in the charging process is illustrated by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Newman v. United States*, (1967) 382 F. 2d 479. In Wisconsin, the district attorney does not, at least in theory, enjoy quite the same omnipotence. A magistrate may, but usually will not, issue a warrant on a complaint not approved by the district attorney. Moreover, if the district attorney determines not to file an information against a person bound over for trial on a felony charge, section 955.17 (2), Wisconsin Statutes, requires the district attorney to file a statement of his reasons, but the court or presiding judge may disagree and require an information to be filed.

As an attorney at law, the district attorney is, of course, an officer of the court. He is a sworn minister of justice.

*State v. Russell,* (1892) 83 Wis. 330, 338, 53 N. W. 441;

*State ex rel. Sauk County District Attorney v. Gollmar,* (1966) 32 Wis. 2d 406, 413, 145 N. W. 2d 670.

As to United States Attorneys, this Court has recently stated:

> "* * * the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer' * * *." *Singer v. United States,* (1965) 380 U. S. 24, 36, 85 S. Ct. 783, 13 L. ed. 2d 630, 638-639.

It is anomalous that the advice of a "neutral and detached magistrate" (whose finding of probable cause is said to be necessary to the issuance of a valid warrant) *is not,* as such, a defense to a suit for malicious prosecution, while that of the district attorney (said now to be incompetent to find probable cause and issue warrants) *is* a defense.

54 C. J. S. 1012-1014—Malicious Prosecution § 48;

*Sutton v. McConnell,* (1879) 46 Wis. 269, 50 N. W. 414;

*Lueck v. Heisler,* (1894) 87 Wis. 644, 650, 58 N. W. 1101.

As to reliance upon the advice of the prosecuting attorney, see Anno. 10 A. L. R. 2d 1215.

Finally, prosecuting officers have been held immune from liability under the Civil Rights Act on the ground that they are judicial or quasi-judicial officers and partake of the same immunity as judges. Many cases so holding are collected in the recent case of *Bauers v. Heisel,* (3rd

Circ. 1966) 361 F. 2d 581, 586-587, note 7, cert. den. (1967) 386 U. S. 1021. In so holding with regard to a New Jersey county prosecutor, the court stated at 361 F. 2d 589-590:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. See Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 492 (1961); Comment, 18 Ark. L. Rev. 81, 84-92 (1964). Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, Griffin v. United States, 295 F. 437, 439-440 (C. A. 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself. Yaselli v. Goff, 12 F. 2d 396 (C. A. 2, 1926), aff'd, per curiam 'on the authority of Bradley v. Fisher * * * [and] Alzua v. Johnson, 231 U. S. 106, 111 [34 S. Ct. 27, 58 L. Ed. 142],' 275 U. S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927), and numerous cases and authorities cited therein. Prosecuting attorneys who have been sued under the Civil Rights Act, R. S. § 1979, have likewise been held immune. Laughlin v. Rosenman, 82 U. S. App. D. C. 164, 163

F. 2d 838 (1947); Kenney v. Fox, supra, and other cases cited in note 7, supra."

Therefore, to equate the district attorney (a judicial or quasi-judicial officer, learned in the law, a sworn minister of justice) who as a practical matter is the officer who determines whether or not a charge will be brought, with police officers, sheriffs and other enforcement officers (usually laymen) "engaged in the often competitive enterprise of ferreting out crime," is wholly unjustifiable.

After the decision of the United States Court of Appeals in this matter, this Court for the first time intimated in an *obiter dictum* that a state district attorney does not qualify as a "neutral and detached magistrate" for the purpose of issuing a *search warrant*. (Wisconsin has never authorized its district attorneys to issue search warrants—only warrants of arrest.) Actually, the district attorney had not issued a search warrant, but a subpoena *duces tecum*, which could in no event qualify as a search warrant or justify a search for the articles ordered to be produced. *Mancusi v. De Forte*, (6/17/68) 88 S. Ct. 2120, 2125.

District attorneys were initially authorized to issue warrants of arrest by chapter 558, Wis. Laws 1945. Because district attorneys normally were the ones who decided whether or not a warrant would issue and who drafted the complaints and warrants (as they still do) and the visit to a magistrate's office was but a useless, time-consuming, and (because justices of the peace received a fee for their "services" in swearing complainants and issuing warrants which had already been prepared for them) often an expensive formality, and because it would

often happen in the rural areas that no magistrate was available and complainants had to be told to return on another day, it seemed reasonable to vest in the district attorneys the authority to issue the warrants themselves and to take the oaths of complainants.

However, the legislature did not intend to vest district attorneys with the full powers of magistrates, including issuance of search warrants, conducting of preliminary examinations, and conducting John Doe hearings, so it was provided that they "are not magistrates and their authority to issue such process is limited to that prescribed in section 361.02 (2) [now 954.02]." It was a sensible, practical, and convenient law, and it went unchallenged on constitutional grounds for 20 years.

## II. *STATE EX REL. WHITE v. SIMPSON,* (1965) 28 WIS. 2D 590, 137 N. W. 2D 391, SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

After 20 years of district attorneys' warrants of arrest, the Wisconsin Supreme Court held on Federal constitutional grounds that district attorneys were not "the equivalent of a neutral and detached magistrate who may constitutionally be empowered to authorize the issuance of the warrant." *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 597-598, 137 N. W. 2d 391. *White* was not a criminal case, but a civil paternity proceeding, and the warrant was actually issued by the deputy clerk of court upon authorization of an assistant corporation counsel.

Later, the court held that, on collateral attacks upon convictions, the *White* rule would not be retroactively ap-

plied to cases finalized before it was announced, even if the point had been timely raised. *State ex rel. La Follette v. Raskin,* (1966) 30 Wis. 2d 39, 55, 139 N. W. 2d 667.

Then the court in the state predecessor of this case, *State ex rel. Schmear v. Gagnon,* (1967) 35 Wis. 2d 447, 151 N. W. 2d 20 (R. 43-47), declined to give retroactive effect to the *White* case to exclude evidence. Its decision on that point was well grounded in federal law.

The arrest of the petitioner pursuant to the district attorney's warrant was not an arrogant police action in flagrant violation of petitioner's rights. Who was the policeman that he should question process issued by the district attorney which the lawyers considered proper procedure?

In holding that the rule of *Mapp v. Ohio,* (1961) 367 U. S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, 84 A. L. R. 2d 933, should not be retroactively applied in view of the fact that it overruled an earlier case which had been relied on, *Wolf v. Colorado,* (1949) 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, this Court said in part:

> "We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' Chicot County Drainage Dist. v Baxter State Bank, supra, 308 US at 374, 84 L ed at 332. The thousands of cases that were finally decided on Wolf cannot be obliterated. The 'particular conduct, private and official,' must be considered. Here 'prior determinations deemed to have finality and acted upon accordingly' have 'become vested.' And finally, 'public policy in the light of the nature both of the . . . [Wolf doctrine] and of its previous application' must be given

its proper weight. Ibid. In short, we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

"* * *

"It is true that both the accused and the States relied upon Wolf. Indeed, Wolf and Irvine each pointed the way for the victims of illegal searches to seek reparation for the violation of their privacy. Some pursued the same. See Monroe v Pape, 365 US 167, 5 L ed 2d 492, 81 S Ct 473 (1961). In addition, in Irvine, a flag in a concurring opinion warned that Wolf was in stormy weather. On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again this Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

"Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter v. Walker,* (1965) 381 U. S. 618, 14 L. ed. 2d 601, 85 S. Ct. 1731.

See also, *Tehan v. Shott*, (1966) 382 U. S. 406, 15 L. ed. 2d 453, 86 S. Ct. 459, in which this Court held that its decision applying the Fifth Amendment privilege against compulsory self-incrimination would not be retroactively applied.

Finally, in *Johnson v. New Jersey*, (1966) 384 U .S. 719, 16 L. ed. 2d 882, 889-891, 86 S. Ct. 1772, this Court held that the *Miranda* and *Escobedo* cases would not apply to trials which commenced before the respective dates on which they were decided. In its decision on retroactivity of new rules of constitutional law, this Court said in part:

> "We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. * * *
>
> "We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. * * *
>
> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to Jackson v Denno, supra, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to Griffin v California, supra, despite the fact that comment on the failure to testify

may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. .

"* * *

"At the same time, retroactive application of Escobedo and Miranda would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. * * *"

It is submitted that the same considerations which apply to the question of retroactivity of the *Mapp* case and the Fifth Amendment cases apply here. Prior to the Wisconsin court's decision in *White,* many, many, warrants were issued by district attorneys and executed in all good faith by police officers. No doubt a large number of these resulted in searches incidental to the arrests which produced evidence which was received at the defendants' trials. To apply the *White* case retroactively for the purpose of upsetting convictions in such cases would not be in the interest of the administration of justice.

It is therefore respectfully submitted that, there being no substantial federal question involved, the writ of certiorari should be denied.

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